



ICLG

The International Comparative Legal Guide to:

Real Estate 2016

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A practical cross-border insight into real estate law

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Switzerland

Wolfgang Müller



Meyerlustenberger Lachenal

Christian Eichenberger



1 Real Estate Law

- 1.1 Please briefly describe the main laws that govern real estate in your jurisdiction. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1.**

Switzerland is a civil law country. Real estate is mainly governed by written laws on a federal level such as the Swiss Civil Code, the Swiss Code of Obligations, the Act on the Acquisition of Real Estate by Persons Abroad (so-called Lex Koller), the Debt Enforcement and Bankruptcy Act and the Ordinance on the Land Register.

- 1.2 What is the impact (if any) on real estate of local common law in your jurisdiction?**

As said before, Switzerland is a civil law country. Hence, there is in principle no common law in Switzerland. Nevertheless, there is also case law which offers guidance on the interpretation of written laws. Such case law has an impact in particular on the field of landlord-tenant law where a lot of cases are produced, in particular in the Western (French-speaking) part of Switzerland.

- 1.3 Are international laws relevant to real estate in your jurisdiction? Please ignore EU legislation enacted locally in EU countries.**

Not really, only double taxation treaties and the Hague Trust Convention seem worth mentioning.

2 Ownership

- 2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

The Lex Koller (see the answer to question 1.1 above) restricts the acquisition of Swiss residential and other non-commercial real estate by foreign (i.e. non-Swiss) persons. In recent years, and in particular since 2007, it has been heavily debated whether the Lex Koller should be abolished altogether on the one hand, or made even stricter on the other. It is widely recognised that the Lex Koller is the only effective measure to reduce the demand for Swiss residential properties.

The acquisition of residential premises by non-Swiss persons remains restricted while the acquisition of business premises is, as a rule, unrestricted under the Lex Koller. However, the debate regarding the Lex Koller is expected to continue. In April 2015 the Swiss Federal Council announced that it will once again review the Lex Koller and suggest amendments in the spring of next year.

3 Real Estate Rights

- 3.1 What are the types of rights over land recognised in your jurisdiction? Are any of them purely contractual between the parties?**

The most important types of land on the one hand are ownership, co-ownership (in particular in the form of the condominium-principled co-ownership), building rights and usufructuary rights. On the other hand, lease contracts play a major role in practice, both with residential and commercial properties. The latter are purely contractual between the parties, unless they are annotated in the land register.

- 3.2 Are there any scenarios where the right to a real estate diverges from the right to a building constructed thereon?**

Yes, in the case of a building right, the right to a real estate diverges from the right to a building constructed thereon. In such a scenario, we have two owners: one who owns the soil; and the other who owns the building built thereon.

4 System of Registration

- 4.1 Is all land in your jurisdiction required to be registered? What land (or rights) are unregistered?**

In principle, all privately owned land is registered in the land register. However, no rights of private ownership apply to public waters or to land not suitable for cultivation, such as rocks and scree, firm and glaciers, or to springs rising therefrom, unless proof to the contrary is provided. Immovable property which is not privately owned and is in public use will be recorded in the land register only if rights *in rem* attaching to such property are to be registered or if cantonal law provides for its registration.

4.2 Is there a state guarantee of title? What does it guarantee?

There is no explicit state guarantee of title. However, the land register is assumed to be complete and correct and everyone may rely on it in good faith. Therefore, the state (i.e. the respective canton) is liable for any losses arising from the maintenance of the land register.

4.3 What rights in land are compulsorily registrable? What (if any) is the consequence of non-registration?

All acquisition of land ownership must be recorded in the land register. The consequence of non-registration is that the title remains with the seller – hence, the respective transaction is not yet closed. In addition, all rights relating to the property and relevant to everyone, not just to a contractual party, must be registered in the land register.

4.4 What rights in land are not required to be registered?

Emption rights, pre-emption rights, repurchase rights and lease agreements are, for example, rights in land that are not required to be registered.

4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

No, there is no such probationary period following first registration under Swiss law.

4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Transfer of title occurs upon the respective entry into the “journal” of the land register, provided, however, the application is later registered in the “main register” of the land register.

4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

Except for mortgages which have an assigned rank among each other, irrespective of the time of registration, registered rights obtain priority over other rights in accordance with the “rule of seniority”, which means in principle “first in time, first in right”. Such rule, however, can be contracted away.

5 The Registry / Registries

5.1 How many land registries operate in your jurisdiction? If more than one please specify their differing rules and requirements.

For land register purposes the cantons are divided into districts. Hence, the 26 cantons are responsible for setting up the land

registries, the demarcation of the districts, the appointment and remuneration of officials and supervision arrangements.

5.2 Does the land registry issue a physical title document to the owners of registered real estate?

The land registry issues (upon request of the owner) an extract from the land register. Such extract does not, however, qualify as a physical title document. Due to the legal assumption that the land register is complete and correct (see the answer to question 4.2 above) it is not necessary to issue a separate title document.

5.3 Can any transaction relating to registered real estate be completed electronically? What documents need to be provided to the land registry for the registration of ownership right? Can information on ownership of registered real estate be accessed electronically?

The cantons can allow their land registries to communicate and conduct transactions electronically. The transferor of real estate (e.g. the seller) should file to the land registry an application for the registration of the new owner (e.g. the buyer) and furnish supporting documents (e.g. the purchase and sale deed).

5.4 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Yes, the state (i.e. the respective canton) is liable for any losses arising from the maintenance of the land register.

5.5 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

Any person is entitled to obtain the following information from the register without showing a legitimate interest:

1. the name and description of the immovable property;
2. the name and identity of the owner; and
3. the form of ownership and the date of acquisition.

A person showing a legitimate interest is entitled to consult the land register or to be provided with an extract. Hence, a buyer could also obtain directly from the land registry all the information he/she might reasonably need regarding encumbrances and other rights affecting real estate. Furnishing evidence to establish a legitimate interest, however, takes time. In practice, it is thus more convenient for the buyer to get an extract from the land register via the seller.

6 Real Estate Market

6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your jurisdiction? Please briefly describe their roles and/or duties.

Lawyers who assist the seller and/or the buyer in conducting a due diligence, drafting and/or reviewing the contract documents are often involved. In addition, there are notaries public involved who draft and notarise the purchase and sale deed. Other parties involved are, for example, banks, realtors, technical/environmental consultants and appraisers.

6.2 How and on what basis are these persons remunerated?

The fees of the notaries public are subject to the respective laws of the cantons. Realtors receive for their brokerage services normally a certain percentage of the purchase price. Lawyers, consultants and appraisers are normally remunerated on an hourly basis.

6.3 Do you feel there is a noticeable increase in the availability of capital to finance real estate transactions in your jurisdiction, whether equity or debt? What are the main sources of capital you see active in your market?

In Switzerland, it has always been possible to access reasonable finance for real estate transactions, even following the 2008 financial crisis. While real estate as an asset class is still attractive to insurance companies and pension funds, new standards put in place by the Swiss National Bank and the Swiss Bankers' Association are beginning to show effects: banks are forced to be more prudent when lending money to private individuals (see the answer to question 8.1 below).

6.4 What is the appetite for investors and developers in your region to look beyond primary real estate markets and transact business in secondary or even tertiary markets? Please give examples of significant secondary or tertiary real estate transactions, if relevant.

Yes, we recently saw investors going beyond the beaten track of the primary markets by transacting business in secondary or even tertiary markets. For example, there are investments made in real estate development projects in mid-sized Swiss cities such as Lausanne or Solothurn or in commercial properties in cities like Thun and St. Gallen. Certain foreign investors have been interested in acquiring Swiss hotels or invested in resorts in the Swiss Alps in recent years (e.g. Andermatt or Bürgenstock).

6.5 Have you observed any trends in particular market sub sectors slowing down in your jurisdiction in terms of their attractiveness to investors/developers? Please give examples.

An example is vacancy rates regarding office space in some cities, and in particular city centres such as Geneva and Zurich, which have increased substantially in recent years.

7 Liabilities of Buyers and Sellers in Real Estate Transactions

7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

The purchase and sale deed needs to be notarised by the notary public and the seller (or the notary public, respectively) should file to the land registry an application for the registration of the new owner (e.g. the buyer).

7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

There is no formal duty of disclosure. However, the seller is under

a duty to act in good faith which implies, for example, that he has to reply to questions of the buyer relating to the transaction truly and accurately.

7.3 Can the seller be liable to the buyer for misrepresentation?

Yes, if the seller does not disclose important information or gives false information, he/she may be liable for misrepresentation.

7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

According to the Swiss Code of Obligations, the seller is liable to the buyer for any breach of warranty and for any defects that would materially or legally negate or substantially reduce the value of the purchase object or its fitness for the designated purpose. Such warranty is, however, in practice often contracted away (at least to some extent) in real estate asset transactions. However, any agreement to exclude or limit the warranty obligation is void if the seller has fraudulently concealed the failure to comply with the warranty.

7.5 Does the seller warrant its ownership in any way? Please give details.

According to the Swiss Code of Obligations the seller is obliged to transfer the purchased real estate to the buyer free from any rights enforceable by third parties against the buyer. In practice, the seller simply provides the buyer with an excerpt from the land register confirming his ownership (see also the answer to question 5.2 above).

7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

In addition to paying the sale price, the buyer has to pay the fees and taxes as provided for by law and/or contract.

8 Finance and Banking

8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

Pursuant to the observations of the Swiss National Bank (SNB), the countercyclical capital buffer (CCB) and other measures did not provide sufficient relief with regard to the risks associated with the existing imbalances in the mortgage and real estate market. The SNB was particularly concerned about the continued growth of residential property prices and mortgage loans during 2013. In order to further strengthen the resistance capacity of the Swiss banks and the whole Swiss economy to risks arising from the aforementioned market imbalances, the SNB requested that the Swiss Federal Council increase the CCB from 1% to 2% as from 30 June 2014. On 22 January 2014, the Federal Council followed the SNB's request and decided to double the CCB.

As a consequence, domestic banks had until the end of June 2014 to increase the additional capital buffer to 2% of their direct or indirect mortgage-backed risk-weighted assets where the mortgaged property is Swiss residential real estate. This applies to both owner-occupied and investment properties, but only insofar as the mortgages are backed by residential real estate. It does not apply if the mortgaged property is a commercial property.

The Swiss Bankers Association's guidelines on the minimum requirements for mortgage financing for owner-occupied residential property entered into force on 1 September 2014, with transactions initiated prior to this date subject to a transitional period of five months. Under these guidelines, a deposit of at least 10% of the loan value must be paid (with funds that do not come from the second pillar) for new purchases and mortgage increases. If the purchase price is higher than the loan value, the difference must be paid in full with own funds that do not come from the second pillar. The mortgage debt must be reduced to 2/3 of the loan value of the property within a maximum period of 15 years, with repayments made on a straight-line basis starting at the latest 12 months from the date on which the deposit was paid. These stricter regulations concerning own financing should help put a halt to the increase in real estate prices.

The SNB rules apply to both resident and non-resident persons.

8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

In Switzerland, the main method by which a real estate lender seeks to protect itself from default by the borrower is the mortgage.

8.3 What are the common proceedings for realisation of mortgaged properties? Are there any options for a mortgagee to realise a mortgaged property without involving court proceedings or the contribution of the mortgagor?

If the creditor's debt is secured by a mortgage, the pledged property is seized and sold at auction by the debt enforcement office (the respective foreclosure proceedings are governed by the Debt Enforcement and Bankruptcy Act and its respective ordinances). Lender and borrower may, however, in a security agreement also agree on the private realisation of the collateral. In the latter case there are no court proceedings to be initiated to realise the mortgaged property.

8.4 What minimum formalities are required for real estate lending?

The establishment of a new mortgage certificate is to be notarised and a respective application is to be filed with the land registry. At the same time, there are no formalities in place as to the entering into a credit facility.

8.5 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

Mortgages have a certain assigned rank among each other. In general, the claims based on mortgage certificates prevail over unsecured or unprivileged claims.

9 Tax

9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

The acquisition of real estate or the majority of the shares in a Swiss real estate company may be subject to a real estate transfer tax of between 1% and 3%, depending on the canton where the property is located. Certain cantons do not apply a real estate transfer tax, such as Zurich which abolished real estate transfer tax a few years ago. The tax is normally payable by the buyer. Often, the buyer and seller are jointly and severally liable for the real estate transfer tax. Contractual agreements are possible with respect to the internal allocation of the tax burden between buyer and seller. In certain cantons, tax laws may foresee a lien on the property to secure the transfer taxes.

9.2 When is the transfer tax paid?

It depends on the regulations of the respective canton. In an asset deal, the transfer tax is sometimes paid through the notary public. In some cantons the notary is personally liable for the payment of the transfer tax.

9.3 Are transfers of real estate by individuals subject to income tax?

Yes, the gain realised through a real estate transfer is subject to tax either as a special real estate income tax or as normal income tax.

9.4 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Transfers of real estate are, as a rule, excluded from VAT. However, waiver of exemption and option for VAT on the purchase price of the building(s) is possible, provided that the real estate is not used for private purposes. As a result, the investor will be able to reclaim Swiss input VAT on the purchase price (the current VAT rate is 8%). Many interesting questions may arise regarding VAT and Swiss real estate that cannot be treated in more detail here, although they may be very relevant in economic terms and should therefore be carefully considered.

9.5 What other tax or taxes (if any) are payable by the seller on the disposal of a property?

There are no other taxes. It should, however, be noted that the buyer and seller are jointly liable for Swiss income tax on brokerage fees paid to a foreign (non-Swiss) broker involved in the transaction. The tax liability is limited to 3% of the purchase price of the property.

9.6 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

The real estate transfer tax, if any, is owed in case of an asset or share deal (see the answer to question 9.1 above). It may be possible to reduce or eliminate taxes on capital gains if a company holding the property is sold.

10 Leases of Business Premises

10.1 Please briefly describe the main laws that regulate leases of business premises.

The laws that regulate leases of business premises are, on the one hand, the Swiss Code of Obligations (Art. 251 to 301) and, on the other hand, the Ordinance regarding the Lease of Residential and Business Premises. There is no separate Swiss act that deals with the leases of business premises only.

10.2 What types of business lease exist?

Various types of business lease exist in practice such as fixed term leases or leases that last for an indefinite period of time, ordinary leases or leases which come close to double or triple net lease agreements.

10.3 What are the typical provisions for leases of business premises in your jurisdiction regarding: (a) length of term; (b) rent increases; (c) tenant's right to sell or sub-lease; (d) insurance; (e) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and (f) repairs?

(a) Business leases typically last for five or ten years, possibly with an option of one additional five-year period; (b) the parties often agree on indexed rents based on the Swiss consumer price index; (c) subject to the landlord's approval the tenant is entitled to sublet the premises; (d) we often see clauses according to which the tenant is to provide liability insurance; (e) (i) change of control does in principle not affect the commercial lease agreement, (ii) in a merger a lease agreement is transferred to the new (restructured) entity; the acquiring legal entity shall, however, secure claims of the creditors involved in the merger, if creditors so demand within three months after the merger becomes legally effective; and (f) generally speaking and as basic rule the landlord is responsible for major repairs. Exceptions may apply with leases which come close to double and triple net lease agreements.

10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

Under certain circumstances, and if opted for, VAT business leases may be subject to VAT (which is currently at 8%).

10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.)? Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

Depending on the circumstances of the case at hand, business leases can indeed be terminated at expiry, on default or by either party giving notice. The tenant may request the extension of a fixed-term or open-ended lease where termination of the lease would cause a degree of hardship for him that cannot be justified by the interests of the landlord. A commercial lease may be extended up to six years.

10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non-compliance?

As a basic rule, the lease passes to the acquirer together with ownership of the property sold. The new owner may, however, serve notice to terminate a lease on commercial premises as of the next legally admissible termination date if it claims an urgent need of such premises for itself. If the new owner terminates sooner than is permitted under the contract with the existing landlord, the latter is liable for all resultant losses.

10.7 Green leases seek to impose obligations on landlords and tenants designed to promote greater sustainable use of buildings and in the reduction of the "environmental footprint" of a building. Please briefly describe any "green obligations" commonly found in leases stating whether these are clearly defined, enforceable legal obligations or something not amounting to enforceable legal obligations (for example aspirational objectives).

In Switzerland there are commonly no such provisions in lease agreements.

11 Public Law Permits and Obligations

11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land? Please briefly describe them and include environmental laws.

The Swiss system of zoning and planning is performed on four levels (federal, cantonal, regional and local). On each level respective laws exist. Environmental protection is mainly addressed on a federal level.

11.2 Can the state force land owners to sell land to it? If so please briefly describe including price mechanism.

If the rules of expropriation are followed, the state can force land owners to sell land to it in order to achieve certain goals which are in the public interest. The basic rules of expropriation are as follows: the state needs to establish that (i) there is a sufficient legal basis for the expropriation, (ii) the expropriation is in the public interest, (iii) the expropriation is in accordance with the principle of proportionality, (iv) the goal of the state cannot be achieved by other reasonable measures, and (v) the land owner is fully compensated.

11.3 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Land/building use and/or occupation and environmental regulation are in most cases controlled by authorities determined by the cantons and the communities. In order to get reliable information on these matters, the respective authorities have to be contacted. More and more information is available online.

11.4 What main permits or licences are required for building works and/or the use of real estate?

In most cases a permit is necessary to build, modify, demolish or change the use of a building.

11.5 Are building/use permits and licences commonly obtained in your jurisdiction? Can implied permission be obtained in any way (e.g. by long use)?

It depends on the circumstances of the case at hand. Implied permission is hardly ever seen.

11.6 What is the appropriate cost of building/use permits and the time involved in obtaining them?

Time and costs vary from canton to canton and community to community. They range (depending on the project) from several hundred to several hundred thousand Swiss francs.

11.7 Are there any regulations on the protection of historic monuments in your jurisdiction? If any, when and how are they likely to affect the transfer of rights in real estate?

There are regulations on the protection of historic monuments on a federal, cantonal and community level. They do not directly affect the transfer of rights in real estate. The buyer should, however, be aware that certain modifications to a building may be impossible and/or subject to negotiations with the authorities.

11.8 How can e.g. a potential buyer obtain reliable information on contamination and pollution of real estate? Is there a public register of contaminated land in your jurisdiction?

Yes, each canton has a public register of contaminated real estate. More and more such registers are available online. However, the fact that a property is not entered in such register does not necessarily mean that the property is not contaminated or polluted.

11.9 In what circumstances (if any) is environmental clean-up ever mandatory?

A property must be cleaned up if it is listed in the public register of contaminated real estate as being polluted.

11.10 Please briefly outline any regulatory requirements for the assessment and management of the energy performance of buildings in your jurisdiction.

The assessment and management of the energy performance is regulated on a cantonal level. In general, it is non-mandatory for the owners to perform respective tests.

12 Climate Change

12.1 Please briefly explain the nature and extent of any regulatory measures for reducing carbon dioxide emissions (including any mandatory emissions trading scheme).

Under the heading “energy strategy 2050”, a comprehensive set of documents has been produced in recent years and the topic is currently heavily debated in the Swiss Parliament. As part of the energy strategy 2050, the CO₂ Act has been revised and came into force on 1 January 2013. It sets out targets for emissions reductions until 2020 and contains measures for buildings, transport and industry. Among others, a building programme has been established in order to promote energy efficient technologies for the renovation of buildings and investment in renewable energies, waste heat recovery and the optimisation of building utilities. It is planned to replace the existing concept of subsidies by a steering charge.

12.2 Are there any national greenhouse gas emissions reduction targets?

Based on the Kyoto protocol, the CO₂ Act aims at reducing the greenhouse gas emissions by 2020 by 20% compared to the level of 1990. The Federal Council may tighten this reduction goal from 20% to 40%.

12.3 Are there any other regulatory measures (not already mentioned) which aim to improve the sustainability of both newly constructed and existing buildings?

Part of the energy strategy 2050 will be, among others, a revised Energy Law. Moreover, the Environmental Protection Law also contains provisions relating to construction works and buildings, and the Environmental Compatibility Assessment Law provides that any construction or building measures which materially influence the environment need to undergo an environmental compatibility assessment.

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Wolfgang Muller is a partner at Meyerlustenberger Lachenal and heads the real estate team. His practice focuses on real estate and capital markets. Wolfgang Muller graduated from the University of Zurich in 1990 and in 1992 was conferred a doctoral degree by the University of Zurich (*Dr.iur.*). He was admitted to the bar in Switzerland in 1993. After having successfully completed his MBA at the Australian School of Business in Sydney/Australia and the University of Michigan Business School in Ann Arbor/USA, he joined the company in 1997 and has been a partner since 2004.

Wolfgang Muller is recommended by Legal 500 as one of five leading individuals for real estate and construction in Switzerland.

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Christian Eichenberger specialises in real estate and rental law as well as construction and area planning law. He advises clients and represents them in court and before regulatory authorities.

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